



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 8, 1998

Ms. Patricia Williams
Assistant City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR98-2393

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118936.

The City of Plano (the "city") received a request for the following information:

1. Any and all documents to or from the City of Plano, to or from 'all cellular telephone service providers' regarding payment of 'service fees to the City of Plano' as stated in your February 12, 1998, Affidavit in Cause No. 296-697-97; *City of Plano, Texas v. Southwestern Bell Mobile Systems Inc.*; In the 196th Judicial District Court, Collin County, Texas;
2. All drafts of Ordinance 96-1-30 prior to enactment and any documents specifically referring to Ordinance 96-1-30 after its enactment; and
3. All systems reflecting funding to the City of Plano's 9-1-1 System.

You state that certain portions of the request are vague, ambiguous, and unclear.¹ You have, however, identified information you believe is responsive to the request. You claim that this information is excepted from disclosure under section 552.103 of the Government Code. We

¹We note that if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b); *see also* Open Records Decision No. 561 at 8 (1990).

have considered the exception you claim and have reviewed the representative sample of documents you have submitted.²

Initially, we note that the requestor has asked you to prepare a list of the documents you seek to withhold from disclosure. This list is to include a full description of each record, your reasons for withholding this information, and your reasons for not invoking your discretionary power to release the information pursuant to § 552.007. You argue that the creation of such a document falls outside the scope of the city's responsibilities under the Open Records Act. We agree. The Open Records Act does not require a governmental body to make available information which does not exist nor does it require a governmental body to prepare new information. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 (1992), 362 (1983). Consequently, you need not respond to this portion of the request. We will now address your arguments against disclosure.

Section 552.103(a) of the Government Code excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 551 at 4 (1990). Therefore, the governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You explain that the city and Southwestern Bell Mobile Systems are currently involved in litigation arising from the city's enforcement of Ordinance No. 96-1-30. We have reviewed the submitted documents and conclude that litigation is pending. We also

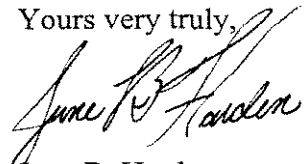
²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

find that the requested information relates to the pending litigation. Therefore, the city may withhold the requested information under section 552.103(a).

We note, however, that if the opposing party in the pending litigation has seen or had access to any of the information in these documents, there would be no justification for withholding that information from disclosure pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 118936

Enclosures: Submitted documents

cc: Mr. Andrew R. Korn
Attorney at Law
900 Jackson Street, Suite 470
Dallas, Texas 75202
(w/o enclosures)